Supreme Court, U.S.
FILED

961785 MAY 5 1997

OFFICE OF THE CLERK

No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

SAMUEL A. CHERNIAK, *of Counsel*
Counsel of Record
Gelman & Feinberg
551 Fifth Avenue
New York, New York 10176
(212) 557-0559

GEORGE J. NAVAGH
1110 Central Park Tower
37 Franklin Street
Buffalo, New York 14202
(716) 842-6230 ext. 22

Counsel for Cross-Petitioner

May 5, 1997

18 pp

QUESTIONS PRESENTED

Where a claim under 18 U.S.C. § 1962(c) defines the "enterprise" as a holding company and all of its subsidiaries, as well as agents engaged by the companies:

1. Are individual officers and managers of the holding company or of its subsidiaries sufficiently distinct from the enterprise to be RICO defendants?

2. Are the holding company and two of the subsidiaries each sufficiently distinct from the enterprise to be RICO defendants?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the decision of the United States Court of Appeals for the Second Circuit, which is contained in the Appendix to the opening petition at pages 1a to 20a.[1] References to the Appendix are hereafter referred to as "-a".

In accordance with Supreme Court Rule 29.6, petitioner, Discon, Inc., states that it has no corporate parent or subsidiary.

---

[1] Cross-respondents Eckenrode and O'Reilly are not listed in the caption of the opening petition because the Court of Appeals affirmed the District Court's dismissal of the claims against them, and, accordingly, they did not seek this Court's review of the decision below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Background 3

B. The Complaint 4

C. The Opinion of the District Court 5

C. The Opinion of the Court of Appeals . . 5

REASONS FOR GRANTING THE WRIT 6

THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH MULTIPLE DECISIONS OF NINE OTHER CIRCUIT COURTS OF APPEAL ON AN IMPORTANT QUESTION OF LAW 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Ashland Oil, Inc. v. *Arnett*, 875 F.2d 1271 (7th Cir. 1989) 7

Bennett v. *Berg*, 685 F.2d 1053 (8th Cir. 1982), *aff'd in banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983) 7

Cullen v. *Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987) 5

Davis v. *Mutual Life Insurance Co. of New York*, 6 F.3d 367 (6th Cir. 1993), *cert. denied*, 510 U.S. 119 (1994) 7

Fleischhauer v. *Feltner*, 879 F.2d 1290 (6th Cir. 1989) 7

Haroco v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) 10

Jaguar Cars, Inc. v. *Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995) 7, 8-9

Landry v. *Air Line Pilots Ass'n, AFL-CIO*, 901 F.2d 404 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990) 7

McCullough v. *Suter*, 757 F.2d 142 (7th Cir. 1985) 7, 8, 11

Miranda v. *Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991) 7

Riverwoods Chappaqua Corp. v. *Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994) 5, 9

Sever v. *Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992) 7

United States v. *Benny*, 786 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986) 7, 8

United States v. *Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert denied*, 465 U.S. 1005 (1984) 7

United States v. *Feldman*, 853 F.2d 648 (9th Cir. 1988), *cert denied*, 489 U.S. 1030 (1989) 7, 11

United States v. *Horak*, 833 F.2d 1235 (7th Cir. 1987) 7

United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) 7

United States v. *Robinson*, 8 F.3d 398 (7th Cir. 1993) 7

Yellow Bus Lines, Inc. v. *Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1080 (1991) 7

ADMINISTRATIVE PROCEEDINGS

In the Matter of New York Telephone Co., 5 FCC Rcd. 866 (1988) 3

In the Matter of New York Telephone Co., 5 FCC Rcd. 5892 (1990) 3

New York Telephone Co., 31 N.Y.P.S.C. 485, *aff'd*, 190 A.D.2d 217, 597 N.Y.S.2nd 760 (3d Dept. 1993) 3

STATUTES

18 U.S.C. § 1962(c) . . . . . i, 2, 4, 5, 6, 8, 9

18 U.S.C. § 1962(d) 2, 4, 5

No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal by the United States District Court for the Western District of New York of all the RICO claims in plaintiff's amended complaint.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 93 F.3d 1055, and is set forth in the Appendix at 1a-20a. The order of the Court of Appeals denying cross-respondents'

petition for rehearing and rehearing *in banc* is not reported and is set forth in the Appendix at 54a-55a. The opinion of the District Court is not reported and is set forth in the Appendix at 21a-53a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1996. Cross-respondents' petition for rehearing was denied by the Court of Appeals on January 7, 1997 (54a-55a). The opening petition was placed on the docket of this Court on April 4, 1997. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of this Court. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. § 1962(c) reads as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) reads as follows:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Background

This case arose out of the massive fraud that cross-respondents perpetrated on the ratepayers of NYNEX Corp.'s ("NYNEX") wholly owned subsidiary, cross-respondent New York Telephone Company ("NYTel") by having one of NYNEX's other wholly owned subsidiaries, cross-respondent Material Enterprises Company ("MECo"), buy goods and services that it resold to NYTel at padded prices as much as 600 percent higher than MECo's cost. NYTel then recovered its grossly inflated costs from its captive ratepayers. *See, In the Matter of New York Telephone Co.*, 5 FCC Rcd. 866, 869 (1988) ("NYNEX's corporate purchasing policy...effectively established the regulated telephone compan[y] as [a] captive customer...of MECo"); *In the Matter of New York Telephone Co.*, 5 FCC Rcd. 5892 (1990) (consent decree pursuant to which NYTel and New England Tel. Co. reduced their capital account balances (on which ratepayers were paying depreciation costs) by $32.6 million, reduced their interstate revenue requirements by $35.5 million and paid U.S. Treasury $709,500 each); *New York Telephone Co.*, 31 N.Y.P.S.C. 485, *aff'd*, 190 A.D. 2d 217, 597 N.Y.S.2d 760 (3d Dept. 1993) (disallowing $13.85 million from NYTel's intrastate rates and requiring $20 million yearly to be held subject to refund). As part and parcel of this scheme, MECo conspired with one of its only two suppliers of turnkey central telephone office removal services to exclude its other, lower cost supplier, cross-petitioner Discon, from the market.

B. The Complaint

Insofar as is relevant to this cross-petition, Discon's complaint alleged, *inter alia*, that in implementing the scheme described above, cross-respondents conducted the affairs of an enterprise through a widespread pattern of racketeering, committing numerous acts of mail fraud, wire fraud and extortion. The complaint (J.A. 152-153) and Discon's RICO Case Statement (J.A. 163-186) detailed which predicate acts were alleged to have been committed by each cross-respondent. The complaint defined the enterprise (for the section 1962(c) claim) as an association in fact comprised of NYNEX Corp., each of its subsidiaries, including MECo and NYTel, and agents engaged by NYNEX Corp. or by one or another of its subsidiaries (J.A. 152).

In addition to alleging that cross-respondent Eckenrode -- a NYNEX vice-president -- committed multiple predicate acts, the complaint alleged that he formulated the so-called "Eckenrode Synergy Plan," a plan designed to lead NYTel officials to join in the scheme to subsidize NYTel's unregulated affiliates at the expense of its ratepayers (J.A. 115-116). Cross-respondent O'Reilly -- a then MECo manager -- was alleged, *inter alia*, to have sought to extort from Discon affirmative misrepresentations to NYTel regarding the terms of Discon's contracts with MECo (J.A. 116).

The complaint also alleged that each of the cross-respondents conspired to conduct the affairs of the enterprise through a pattern of racketeering in violation of 18 U.S.C. § 1962(d) (J.A. 156).

C. The Opinion of the District Court

The District Court had jurisdiction over this case pursuant to 15 U.S.C. § 15 and 18 U.S.C. § 1964 (J.A. 114). Insofar as is relevant to this cross-petition, the District Court dismissed Discon's § 1962(c) claim, *inter alia*, for failure to plead fraud with sufficient particularity (42a-43a) and because three of the four alleged acts of extortion occurred more than four years before the complaint was filed. The District Court stated that "the purported Hobbs Act violations ... must be dismissed as time barred" (45a).

The District Court dismissed Discon's § 1962(d) claim because it had dismissed the § § 1962(b) and 1962(c) claims.

D. The Opinion of the Court of Appeals

Insofar as is relevant here, the Court of Appeals affirmed the District Court's dismissal of Discon's § 1962(c) and 1962(d) claims. While acknowledging that, as to the § 1962(c) claim, its decision was "by no means dictated by clear precedent" (18a), and that the situation presented by this case "lies somewhere between *Riverwoods* [*Chappaqua Corp.* v. *Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994)] and *Cullen* [v. *Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987)]," the court reasoned that here, as in *Riverwoods*, "the individual defendants were acting in the scope of a single corporate structure, guided by a single corporate consciousness[, and i]t would be inconsistent for a RICO person, acting in the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*" (19a). Accordingly, the court

held that the persons who were defendants in this case were not sufficiently distinct from the enterprise that they were alleged to have operated through a pattern of racketeering, and, solely on this basis, affirmed the District Courts's dismissal of Discon's
§ 1962(c) claim.

The Court of Appeals then affirmed the District Court's dismissal of Discon's § 1962(d) claim on the exclusive ground that such a claim cannot stand absent a viable cause of action for a substantive violation of RICO (19a-20a).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH MULTIPLE DECISIONS OF NINE OTHER CIRCUIT COURTS OF APPEAL ON AN IMPORTANT QUESTION OF LAW

The decision below, affirming the dismissal of the section 1962(c) claim as to individual cross-respondents Eckenrode and O'Reilly, on the ground that "they were guided by a single corporate consciousness" (19a), directly conflicts with multiple decisions of nine other Circuit Courts of Appeal, all of which have held that individual owners, officers, and employees of such enterprises as corporations, partnerships or unincorporated proprietorships are sufficiently distinct from those enterprises to be liable under § 1962(c) for conducting the affairs of those enterprises through a

pattern of racketeering.[2]

---

[2] *See, Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 45 (1st Cir. 1991) (bank's officers distinct from bank); *Jaguar Cars, Inc.* v. *Royal Oaks Motor Car Co.*, 46 F.3d 258, 269 (3d Cir. 1995) (officers and employees of corporation distinct from corporation); *Landry* v. *Air Line Pilots Ass'n, AFL-CIO*, 901 F.2d 404, 434 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990) (union representative distinct from association in fact that included union); *United States* v. *Cauble*, 706 F.2d 1322, 1340 (5th Cir. 83), *cert denied*, 465 U.S. 1005 (1984) (individual partner distinct from limited partnership); *Davis* v. *Mutual Life Insurance Co. of New York*, 6 F.3d 367, 377-78 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193 (1994) (association of insurance company's agents distinct from company); *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989) (individual sole owner of three corporations distinct from association in fact including him, another individual and the corporations); *United States* v. *Robinson*, 8 F.3d 398, 406-07 (7th Cir. 1993) (officers of company distinct from company); *Ashland Oil, Inc.* v. *Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989) (sole owner of corporation distinct from corporation); *United States* v. *Horak*, 833 F.2d 1235 (7th Cir. 1987) (employee of wholly owned subsidiary distinct from parent company); *McCullough* v. *Suter*, 757 F.2d 142, 143 (7th Cir. 1985) (sole owner of unincorporated proprietorship distinct from proprietorship); *Bennett* v. *Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *aff'd in banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983) (founder of not-for-profit and not-for profits controlled by him distinct from association in fact including him and controlled not-for-profits); *Sever* v. *Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (officers and employees of corporation distinct from corporation); *United States* v. *Feldman*, 853 F.2d 648, 656 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989) (individual distinct from several corporations he had formed); *United States* v. *Benny*, 786 F.2d 1410, 1415-16 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); (operator of sole proprietorship consisting of four individuals using his name distinct from proprietorship); *Yellow Bus Lines, Inc.* v. *Local Union 639*, 913 F.2d 948, 951 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1080 (1991) (adopting panel opinion holding that defendant business agent of local was distinct from local); *United States* v. *Perholtz*, 842 F.2d 343, 353-54 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) (individual distinct from association in fact including him,

The rationale of these holdings is perhaps most clearly and cogently set out in *McCullough* v. *Suter*, 757 F.2d 142 (7th Cir. 1985), where the court, per Posner, J., explained that the distinction that section 1962(c) requires between the "person" who is a defendant and the "enterprise" that the defendant is alleged to have operated through a pattern of racketeering is satisfied where the defendant has employees or associates, whether the enterprise is formally different from the defendant, as where he has formed a corporation, or practically different, as where other individuals work in an unincorporated proprietorship. Thus Suter was a proper defendant because his sole proprietorship, which was the enterprise, employed several other individuals. Moreover, the *Suter* court reasoned, an individual would be a proper defendant where his solely owned corporation is the enterprise even where that corporation has no other employees, because the legal difference between an individual and his corporation gives the individual real protections, such as limited liability, which distinguishes the corporation from the individual. This reasoning was adopted by the Courts of Appeal for the Third and Ninth Circuits in *haec verba*:

> "The only important thing is that [the enterprise] be either formally (as when there is a corporation) or practically (as when there are other people beside the proprietor working in the organization) separable from the individual."

United States v. *Benny*, 786 F.2d 1410, 1416 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986) (quoting *McCollough* v. *Suter*, 757 F.2d 142, 144 (7th Cir. 1985); *Jaguar Cars, Inc.*

---

other individuals and corporations).

v. *Royal Oaks Motor Car Co.*, 46 F.3d 258, 269 (3d Cir. 1995) (*same*).

The decision below ignored the differences, both formal and practical, between the individual cross-respondents and the enterprise alleged. That decision cannot be reconciled with the decisions cited above. In the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits, cross-respondents Eckenrode and O'Reilly, as individuals both formally and practically distinct from the corporations for which they worked and which were part of the alleged association in fact, would have been held subject to liability; here, they were not.

The Court of Appeals' affirmance of the dismissal of Discon's § 1962(c) claim against NYNEX, NYTel and MECo followed from its affirmance of the dismissal of the claim against the individual defendants. The court explained that:

> It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*.

(19a).

Inasmuch as the Court of Appeals ignored the formal and practical separation of NYNEX, NYTel and MECo from each other and from the larger enterprise that included them as well as other NYNEX subsidiaries, the court's decision as to them conflicts with the decisions cited above. Moreover, as to MECo and NYTel, the decision squarely conflicts with the holding of the Court of Appeals for the Seventh Circuit

in *Haroco* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985), that a wholly owned subsidiary can be held liable for conducting the affairs of its parent corporation through a pattern of racketeering. *Haroco* at 402. If under the rule of *Haroco* a subsidiary is distinct from its parent company alone, it is, *a fortiori*, distinct from an association in fact, such as that alleged here, that is comprised of the parent company and other legal entities.

The decisions of the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits cited above present a better reasoned approach than that of the decision below. The bedrock purpose of RICO is to prevent the turning of legitimate businesses to criminal ends. It is precisely such a "turning" of the NYNEX enterprise that is alleged in this case. Those individuals and corporations alleged to have been instrumental in that turning should not be held immune to liability.

That the Court of Appeals held the separate incorporation of NYNEX, MECo and NYTel to be insignificant is especially egregious inasmuch as the separate corporate existence of NYTel, a regulated entity with specific legal obligations under New York Public Service Law, and MECo, an unregulated profit center, was the linchpin of cross-respondents' scheme to foist supra-market costs on NYTel and to have NYTel pass these inflated costs through to its captive ratepayers. That separation was the necessary precondition for the alleged pattern of racketeering through which the scheme was alleged to have been implemented. As the Court of Appeals for the Eighth Circuit explained in *United States* v. *Feldman*, 853 F.2d, *supra*:

> It was [the] very separate existence [of

> Feldman's corporations] that made Feldman's activities possible and profitable, and "it is just this sort of legal shield for illegal activity that RICO tries to pierce." *McCullough*, 757 F.2d at 144.

Feldman at 656.

CONCLUSION

For the foregoing reasons, if the opening petition is granted, the conditional cross-petition should also be granted.

Dated: May 5, 1997

Respectfully submitted,

Samuel A. Cherniak, *of Counsel*
Counsel of Record
Gelman & Feinberg
551 Fifth Avenue
New York, New York 10176
(212) 557-0559

George J. Navagh
1110 Central Park Tower
37 Franklin Street
Buffalo, New York 14202
(716) 842-6230 ext. 22

Counsel for Cross-Petitioner